

JUDGE MANNING

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAGISTRATE JUDGE NOLAN

ARVIDA/JMB MANAGERS, INC.,
ON BEHALF OF ARVIDA/JMB PARTNERS,
A LIMITED PARTNERSHIP

Plaintiff,

v.

U.S. FIRE INSURANCE COMPANY, HOME
INSURANCE COMPANY AND RISK
ENTERPRISE MANAGEMENT INC.

Defendants.

TO: UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

030-0988

CASE NO.

JUDGE

NOTICE OF REMOVAL

CIVIL ACTION TO THE

UNITED STATES

DISTRICT COURT

DOCKETED
FEB 12 2003

FILED

FEB 10 2003

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

Defendant, United States Fire Insurance Company, a New York Corporation, hereinafter referred to as ("U.S. Fire") by and through its, Merlo, Kanofsky & Brinkmeier, Ltd., hereby give notice of the removal of this action from the Circuit Court of Cook County, Chancery Division to the United States District Court for the Northern District of Illinois and respectfully submits to this Honorable Court:

1. On November 20, 2002, Plaintiff, Arvida/JMB Managers, Inc., a Delaware Corporation, on behalf of Arvida/JMB Partners, a Delaware limited partnership hereinafter referred to as ("Arvida/JMB") commenced a civil action against the Defendant, U.S. Fire in the Circuit Court of Cook County, Chancery Division, Case No. 01 CH 21001. (A copy of this complaint is attached as Exhibit A.)

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2. In its complaint, Arvida/JMB alleged jurisdictional facts establishing complete diversity of the parties. More specifically, Arvida/JMB alleged that Arvida/JMB Managers Inc. is a Delaware Corporation with its principal place of business in Chicago, Illinois and is the managing partner of Arvida/JMB Partners, L.P. a Delaware limited partnership with its principal place of business also in Chicago, Illinois. (See paragraph 1, Exhibit A). Arvida/JMB further alleged that U.S. Fire is a New York corporation with its principal place of business in New Jersey. (See, paragraph 2, Exhibit A).

3. Based on the diversity allegations, U.S. Fire in written correspondence to the attorneys for Arvida/JMB stated its intention to remove this case to federal court and served Arvida/JMB a request to admit facts for the purposes of establishing the jurisdictional amount.

4. On December 18, 2002, Arvida/JMB countered by filing a first amended complaint. The substance of this amended complaint was substantially similar to the original complaint. Both the original and the amended complaint contained the same allegations against U.S. Fire. (A copy of this amended complaint is attached as Exhibit B).

5. The only measurable difference in the amended complaint was allegations regarding the structure of the partnership. More specifically, Arvida/JMB alleged that its limited partnership is comprised of a general partner, a limited partner, two associate partners and assignee holders. (See, paragraph 1. Exhibit B).

6. Arvida/JMB claims that this subset of holdings were alleged to have been created pursuant to an assignment agreement dated September 10, 1987 in which shares of the partnership interest were sold at a public offering. A copy of the assignment agreement was not attached to the first amended complaint. Arvida/JMB generally alleges that these "Assignee Holders" reside in Illinois, New York and New Hampshire. Arvida fails to allege the identity of these Assignee Holders by name and address and further fails to state the date when these holders purchased their respective shares.

7. On or about January 6, 2003, Arvida/JMB again amended its complaint to include as defendants, Home Insurance Company hereinafter referred to as ("Home.") and Risk Enterprise Management Ltd., hereinafter referred to as ("REM"). (A copy of the seconded amended complaint is attached as Exhibit C.)

8. Arvida/JMB alleged that Home is a New Hampshire Corporation with its principal place of business in New York and REM is a Delaware Corporation with its principal place of business in New York. (See, paragraphs 8 and 9, respectively, Exhibit C).

9. On January 10, 2003, Arvida/JMB served its responses to the request to admit facts. In its responses, Arvida/JMB admitted that it is seeking damages in excess of \$75,000. A copy of Arvida/JMB's responses to U.S. Fire's request to admit facts is attached and marked as Exhibit D.

10. This Notice of Removal is timely filed pursuant to 28 U.S.C. section 1446, as it was filed within 30 days of the receipt of Arvida/JMB's request to admit facts.

11. This is a civil action arising out of alleged construction defects in homes constructed by and/or at the direction of Arvida/JMB. These defects claims were submitted to Home and U.S. Fire pursuant to the commercial and umbrella liability policies issued by these companies. More specifically, the involved policies are a commercial liability and an excess liability policy issued by Home and a commercial umbrella policy issued by U.S. Fire. REM was merely the claims administrator for Home and had no contractual relationship with Arvida/JMB. After an investigation, U.S. Fire commenced a Declaratory action in the Florida Federal District Court entitled *United States Fire Insurance Company v. Arvida/JMB Partners, L.P. and Arvida/JMB Managers, Inc.*, cause no. 02-23366-CIV-MOORE. Thereafter, Arvida/JMB filed the instant action in the circuit court of Cook County, Chancery Division.

12. The second amended complaint filed by Arvida/JMB contains six counts directed against U.S. Fire and Home. Counts I, III, V and VI are directed against U.S. Fire and Counts II and IV are directed against Home. There are no causes of action nor are there any allegations of fault directed against REM. In fact, Arvida/JMB concedes as much as it states that "REM is named solely for the purposes of assuring full and complete relief with respect to Home's obligations under its insurance policies issued to Arvida/JMB." (See, page 2, Exhibit D).

13. Inasmuch as Arvida/JMB fails to allege any wrongful conduct by REM, REM has been fraudulently joined in an attempt to defeat diversity jurisdiction and its citizenship should be disregarded as a matter of law. See *Lynch Ford, Inc., v. Ford Motor Company, et al.*, 934 F. Supp. 1005 (N.D. Ill 1996)

14. As REM has been fraudulently joined as a Defendant to Arvida/JMB's second Amended Complaint, its joinder or consent is not required for this removal action.

15. Notwithstanding that REM's consent is not required, both Home and REM, through their counsel, have consented to the removal of this action. See Exhibit E.

16. The business structure of Arvida/JMB is a limited partnership. Arvida/JMB is neither a membership association nor an underwriting syndicate. Therefore, for the purposes of diversity jurisdiction, courts must consider the citizenship of the general and limited partners. See, 28 U.S.C. Section 1332(a) and *Cardon v. Arkoma Associates* 110 S. Ct. 1015 (1990). Arvida/JMB's general partner is the corporation, Arvida/JMB Managers Inc. A corporation is a resident of the state of its incorporation and the state of its principal place of business. 28 U.S.C. Section 1332(c). Arvida/JMB Managers Inc. is a Delaware Corporation with its principal place of business in Chicago, Illinois. Arvida/JMB also alleges that it has one initial limited partner. Arvida/JMB does not object to jurisdiction based on the citizenship of this limited partner. Instead, Arvida/JMB asserts that it is the citizenship of the assignee holders that destroy diversity.

17. Assignee holders are not limited partners and their citizenship should not be considered in determining diversity. See, Section 101(6), Revised Uniform Limited Partnership Act and *United National Insurance Company v. Waterfront N.Y. Realty Corp.* 907 F.Supp 663 (S.D. N.Y. 1995) (estate held not to be a limited partner, but that of an assignee holder and as such the citizenship of the estate is not to be considered for purposes of diversity.)

18. Even if this court considers the citizenship of this tier of holdings for purposes of jurisdiction, it is submitted that these assignee holders are "nominal parties" to the litigation and their citizenship should not be used to destroy diversity. See *Navarro Savings Association v. Lee*, 100 S.Ct. 1779 (1980). The fact that members feel the blow through a trickle down effect is irrelevant to a jurisdictional analysis. *Arkwright v. Boston Manufacturers Mutual Insurance Co., v. Truck*, 173 F.3d 843 (1999).

19. Arvida/JMB distinguished among the different levels of its partnership. In separating out these classes, Arvida/JMB admits that the rights and duties differ among the tiers. Thus, the assignee holders who are represented in the bottom tier of the partnership do not have the same standing as the initial limited partner and are not "real and substantial parties to the controversy." *Navarro*, 100 S.Ct. at 460.

20. Arvida/JMB has avail itself to diversity jurisdiction after September 10, 1987, the date of the agreement that created the class of Assignee Holders who Arvida/JMB now claims destroys diversity. More specifically, Arvida/JMB has filed an action on February 2, 1991 in the United District Court for the Southern District of

Florida based on diversity in a breach of contract action entitled *Arvida/JMB Partners, et al v. Lasky*, case no 91-CV-8044. Arvida also defended an action filed on May 22, 1996 in the Southern District of Florida based on diversity entitled *Morehouse v. Cullasaja Venture, Arvida/JMB Partners, et al*, case no 96-CV-8351.

21. In *Moorehouse*, jurisdiction was obtained pursuant to a removal petition. It is a requirement that all defendants in a state court action join a notice of removal. See, *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352 (7th Cir. 2000). Therefore, Arvida as a defendant in *Moorhouse*, joined the removal petition. By doing so, Arvida has taken the position that it is subject to diversity jurisdiction. The Southern District Court of Florida accepted the removal petition and conferred jurisdiction.

22. Therefore, Arvida/JMB's should be judicially estopped from now claiming the inconsistent position that it is not subject to jurisdiction based on the citizenship of the Associate Holders. See *Forty-eight Insulations Inc. v. Aetna Casualty & Surety Co., et al* 162 B.R. 143 (1993) and *Bonnie & Company Fashions, Inc., v. Bankers Trust Company* (18 F.Supp.2d 297 (1998).

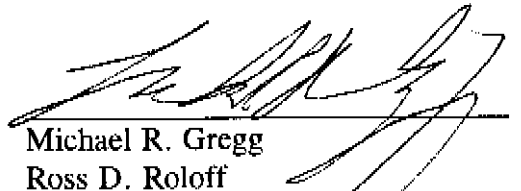
23. Since there is diversity between the plaintiffs and the defendants, the requirements of 28 U.S.C. Section 1332(a) and Section 1441(a) and (b) have been meet. There is complete diversity between citizens of different states and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs. Accordingly, this Court has jurisdiction of this action.

24. This petition for removal is submitted without prejudice to any claims U.S. Fire may assert against the nominal or fraudulently joined parties.

25. As required by 28 U.S. C. Section 1446 (b), U.S. Fire has provided written notice of the filing of this Notice of Removal to counsel for Plaintiff, and James Stickles, counsel for Home and REM. The attorneys for U.S. Fire will promptly file a copy of this Notice of Removal with Clerk of the Circuit Court of Cook County. (A copy of this Notice is attached as Exhibit F.)

WHEREFORE, pursuant to 28 U.S.C. Section 1332(a), 1441(a) and (b), and 1446, Defendants respectfully remove the above-captioned case from the Circuit Court of Cook County, Chancery Division to the United States District Court for the Northern District of Illinois along with all other relief proper in the premises.

Respectfully submitted,



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Attorneys for Defendant,
United States Fire Insurance Company

JS 44
(Rev. 12/96)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

ARVIDA/JMB MANAGERS, INC., a Delaware corporation, on behalf of ARVIDA/JMB PARTNERS, L.P., a Delaware limited partnership,

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF
(EXCEPT IN PLAINTIFF CASES)

DEFENDANTS

UNITED STATES FIRE INSURANCE COMPANY, a New York corporation,

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60602

ATTORNEYS (IF KNOWN)

Merlo, Kanofsky & Brinkmeier, Ltd.
208 South LaSalle Street, Suite 950
Chicago, IL 60605 (312) 553-5500

II. BASIS OF JURISDICTION

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☒ Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 Original Proceeding
☒ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

V. NATURE OF SUIT

(PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 10 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 180 Other Contract <input type="checkbox"/> 185 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 810 Agriculture <input type="checkbox"/> 820 Other Food & Drug <input type="checkbox"/> 825 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 830 Liquor Laws <input type="checkbox"/> 840 R.R. & Truck <input type="checkbox"/> 850 Airline Regs. <input type="checkbox"/> 860 Occupational Safety/Health <input type="checkbox"/> 890 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 881 Agricultural Acts <input type="checkbox"/> 882 Economic Stabilization Act <input type="checkbox"/> 883 Environmental Matters <input type="checkbox"/> 884 Energy Allocation Act <input type="checkbox"/> 885 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 990 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence HABEAS CORPUS: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSD Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609

VI. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

28 USC §§ 1446, 1332 & 1441

VII. REQUESTED IN COMPLAINT

CHECK IF THIS IS A CLASS ACTION
☐ UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint

JURY DEMAND: ☐ YES ☐ NO

VIII. This case

☐ is not a refiling of a previously dismissed action.

☐ is a refiling of case number _____, previously dismissed by Judge _____

DATE

02/10/03

SIGNATURE OF ATTORNEY OF RECORD

RON D. BOFF

UNITED STATES DISTRICT COURT

JUDGE MANNING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

MAGISTRATE JUDGE NOLAN

03C 0988

DOCKETED
FEB 12 2003

In the Matter of

ARVIDA/JMB MANAGERS, INC., a Delaware corporation, on behalf of ARVIDA/JMB PARTNERS, L.B., a Delaware limited partnership v. U.S. Fire Insurance Co.
APPEARANCES ARE HEREBY FILED BY THE UNDERSIGNED AS ATTORNEY(S) FOR:

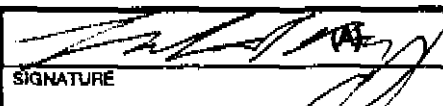
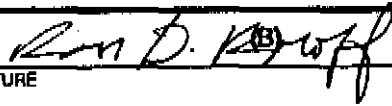
Case Number

03C 0988

U.S. DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

93 FEB 10 PM 1:36

FILED

SIGNATURE 		SIGNATURE 	
NAME Michael B. Gregg Merlo, Kanofsky & Brinkmeier		NAME Ross D. Releoff Merlo, Kanofsky & Brinkmeier	
FIRM 208 South LaSalle St. Suite 950		FIRM 208 South LaSalle St. Suite 950	
STREET ADDRESS Chicago, IL 60604		STREET ADDRESS Chicago, IL 60604	
CITY/STATE/ZIP (312) 553-5500		CITY/STATE/ZIP (312) 55305500	
TELEPHONE NUMBER 6197027		TELEPHONE NUMBER 6216762	
IDENTIFICATION NUMBER (SEE ITEM 4 ON REVERSE)		IDENTIFICATION NUMBER (SEE ITEM 4 ON REVERSE)	
MEMBER OF TRIAL BAR? YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>		MEMBER OF TRIAL BAR? YES <input type="checkbox"/> NO <input type="checkbox"/>	
TRIAL ATTORNEY? YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>		TRIAL ATTORNEY? YES <input type="checkbox"/> NO <input type="checkbox"/>	
		DESIGNATED AS LOCAL COUNSEL? YES <input type="checkbox"/> NO <input type="checkbox"/>	
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SIGNATURE		SIGNATURE	
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FIRM		FIRM	
STREET ADDRESS		STREET ADDRESS	
CITY/STATE/ZIP		CITY/STATE/ZIP	
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DESIGNATED AS LOCAL COUNSEL? YES <input type="checkbox"/> NO <input type="checkbox"/>		DESIGNATED AS LOCAL COUNSEL? YES <input type="checkbox"/> NO <input type="checkbox"/>	

PLEASE COMPLETE IN ACCORDANCE WITH INSTRUCTIONS ON REVERSE.

See Case
File For
Exhibits